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Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Notice of Ex Parte Contact
ET Docket No. 92-9

Dear Ms. Searcy:

Wiley, Rein & Fielding hereby files an original and one copy of a notification of an ex parte contact in ET Docket No. 92-9. On January 28, 1993, copies of the attached document were distributed to the following individuals: Commissioner James H. Quello, Brian F. Fontes, Commissioner Sherrie P. Marshall, Kathleen Q. Abernathy, Commissioner Andrew C. Barrett, Byron F. Marchant, Madelon A. Kuchera, Commissioner Ervin S. Duggan, Linda L. Oliver, Robert M. Pepper, Renee Licht, Cheryl A. Tritt, Gerald P. Vaughn, John Cimko, Jr., Thomas P. Stanley, David R. Siddall, Ralph A. Haller, Beverly G. Baker, and Tom Mooring.

If any questions should arise concerning this notification, please contact the undersigned at (202) 828-4907.

Respectfully submitted,

Nicolle R. Lipper

Encl.

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WILEY, REIN & FIELDING
OVERVIEW AND SUMMARY
OF COMMENTS ON THE
FIRST REPORT AND ORDER AND
THIRD NOTICE OF PROPOSED RULE MAKING
ON EMERGING TECHNOLOGIES
ET DOCKET 92-9

RECEIVED
JAN 28 1993
FEDERAL BUREAU OF INVESTIGATION
DEPARTMENT OF JUSTICE

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January 28, 1993

FOREWORD

On October 16, 1992, the FCC released its First Report and Order and Third Notice of Proposed Rulemaking on "Emerging Technologies" (ET Docket No. 92-9). By this action, the Commission allocated 220 MHz of 2 GHz spectrum for use by emerging technologies and proposed rules for relocating incumbent 2 GHz microwave licensees. However, the Commission requested further comments on the specific details of its transition plan. Forty parties filed comments concerning the transition framework to be adopted.

The descriptive Overview that follows highlights the diverse positions taken by many of these parties on several of the most significant and often controversial issues raised by this proceeding. TAB A contains a table summarizing the positions of the various parties regarding the length and start date of the transition period. Finally, TAB B contains a summary of each commenter's position, arranged by issue.

OVERVIEW OF COMMENTS ON THE FIRST
REPORT AND ORDER AND
THIRD NOTICE OF PROPOSED RULE MAKING
IN ET DOCKET NO. 92-9

Comments Propose a Broad Range of Time Periods and Start Dates for the Transitioning of 2 GHz Microwave Licensees to Accommodate Licensed and Unlicensed Emerging Technologies Services. With respect to spectrum allocated for licensed emerging technology services, the proposed transition periods range from 0 to 15 years in length. The transition periods proposed by most 2 GHz microwave licensees fall within the 5 to 10-year range, with many calling for a "sliding" or "rolling" period of voluntary negotiations to begin when the FCC begins granting authorizations to construct new technology systems. In contrast, emerging technologies proponents generally call for shorter transition periods, ranging from 0 to 3 years to begin upon the request of an emerging technology licensee. The various positions of the commenting parties concerning the length and starting date of the transition period for licensed services are summarized in the attached table.

Many parties did not differentiate between licensed and unlicensed emerging technology offerings in their proposed transition plans. Those specifically addressing unlicensed device issues offered the following positions:

- API and many other 2 GHz microwave licensees support a minimum transition period (generally one year) during which any licensee operating in the band proposed for unlicensed operations would have the opportunity to relocate to other spectrum.

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- Proponents of emerging technologies services such as Apple, APC and Telocator, oppose any transition period for unlicensed devices.
- ROLM asserts that one year should be the maximum allowable transition period.

There is general support among commenting parties for the concept of a transition plan that balances the needs of incumbent microwave users with those of emerging technologies providers. 2 GHz microwave licensees favor a transition framework that takes into account the complexities and difficulties of their migration, including such factors as the time and engineering effort involved.¹ ET proponents typically express concern that the transition process commence without undue delay to allow for deployment of their new technologies. Several ET commenters offered their views of how the transition should occur:

- Telocator proposes a transition process to minimize potential areas of dispute and ensure timely availability of emerging technology services. Specifically, this process would provide emerging technologies providers and 2 GHz licensees with a choice of alternatives for satisfying relocations requirements; would follow established and predictable procedures to facilitate settlements; and would include a dispute resolution mechanism to promote expeditious settlements.
- Personal Communications Network Services of New York argues for a fixed timeframe for converting existing users to secondary status but would allow existing users to seek waivers from conversion.

¹ For example, UTC estimates that the time required to complete a basic microwave relocation is 15 months; relocation of multiple paths would take significantly longer.

- Apple Computer, Inc., proposes a phased implementation of both unlicensed and licensed new technologies, whereby microwave users would be cleared from the 1910-1930 MHz band and relocated subject to a "frequency optimization" plan.
- Time Warner Telecommunications requests clarification from the Commission that the new service provider has the option to begin construction of alternative facilities prior to the end of the transition period, even if the incumbent has declined to negotiate voluntarily up to that point.

Comments Generally Express Skepticism as to the Possibility of Spectrum Sharing. Many 2 GHz microwave licensees urge an early notice policy to alert existing licensees as far in advance as possible of plans to locate a new technology in a specified location. They support adoption of TIA Bulletin 10-E standard as the minimum interference threshold for shared use of 2 GHz spectrum. On the other hand, Southwestern Bell calls for more time for spectrum sharing techniques such as its IMASS system, in order to minimize displacement of 2 GHz licensees.

The 2 GHz Microwave Licensees Argue for Compensation for all Direct or Indirect Costs and Control Over Implementation of New Facilities While ET Commenters Propose More Limited Definitions of Cost Compensation. There is a general consensus among 2 GHz microwave licensees that the ET service provider must guarantee payment of all relocation costs. Costs enumerated by the parties include:

- Engineering, equipment, site acquisition and preparation costs, construction and equipment testing, application preparation and FCC filing fees;

- Additional costs incurred as a result of operation in different fixed microwave band or migration to other media; and
- Cost of all activities necessary for implementation of new facilities.
- Internal engineering time was mentioned by one 2 GHz commenter.

2 GHz commenters also state that they should be able to maintain control over the implementation of replacement facilities.

In contrast, PCS proponents such as Telocator and ROLM take a less expansive view of cost compensation. Telocator, for example, requests clarification that cost compensation includes replacement cost of existing facilities, including all expenses necessary to bring the new system into operation, where the new facilities are deemed to be comparable alternatives. Personal Communications Network Services of New York specifies that compensation should be limited to "reasonable" costs incurred and that additional costs incurred as a result of operation in a different band or migration to other media should include a finite timeframe for payment of such costs.

The Commenters Offer Different Approaches for Defining "Comparability" in Facilities. 2 GHz microwave licensee commenters define comparable alternative facilities to include the following: comparable bandwidth, availability, reliability, quality, performance, capacity, speed,

throughput, and overall efficiency. Parties also specify that new 2 GHz licensees should be required to file a statement from the displaced licensee with license applications confirming that a "seamless handoff" has taken place and that all reimbursement costs have been made, that licensees should never be forced to use common carrier facilities as a replacement for 2 GHz links unless they chose to do so, and that the Commission should request technical standards fora and other industry groups to establish acceptance criteria required to demonstrate comparability.

In response, Telocator proposes that the FCC declare that a rebuttable presumption of comparability is established where the ET provider shows that its proposed facility's specifications meet or exceed those of the incumbent's existing facilities, and demonstrates through reliable engineering documentation that comparable performance can be expected under anticipated field conditions. Southwestern Bell advises that the FCC should rely on a standards body such as TIA to develop appropriate technical standards and that absolute comparability should not be required in instances where "over-engineering" has occurred.

There is General Agreement Among Commenting Parties That Some Form of Alternative Dispute Resolution, Typically

Arbitration or Mediation, is Needed if the Transition Process is to Move Forward. 2 GHz licensee organizations typically place the burden of demonstrating comparability and the costs of dispute resolution on the emerging technologies provider. In contrast, Telocator states that a rebuttable presumption of comparability should arise where an ET provider makes the necessary showings and that the losing party should pay the costs of mediation.

The Comments Suggest Use of 1710-1850 MHz Government Spectrum for a Variety of Uses. All commenting parties agree that access to government spectrum should be pursued as a means of accommodating relocating 2 GHz licensees. However, there are differing views of the priorities for use of such spectrum:

- API and UTC advocate allocating government spectrum to those 2 GHz microwave users who, for technical reasons, cannot be reaccommodated at higher bands or in alternative media.
- APC however, would give priority in access to government spectrum at 1.71-1.85 GHz to those licensees displaced from the unlicensed band.
- Telocator supports a preference for access to those licensees who cannot, for technical reasons, be accommodated in other bands.
- Apple proposes that access to government frequencies be restricted only to public safety licensees who relocate from the 2 GHz band.
- ROLM proposes that public safety and local government microwave systems should be given priority for relocation to federal government frequencies instead of being exempted from the relocation requirement.

2 GHz Microwave Licensees Seek to Broaden the Public Safety Exemption While Unlicensed Device Proponents Argue for Its Elimination. Many 2 GHz microwave licensees support expanding the public safety exemption to include public power systems and other state and local government 2 GHz licensees. In contrast, several unlicensed device proponents oppose any exemption for public safety microwave licensees due to the inability of fixed microwave to share spectrum with unlicensed PCS.

The Comments Generally Recognize the Special Problems of Deploying Unlicensed PCS Devices and the Need for an Entity to Assume Cost Compensation Responsibilities. 2 GHz licensees express general support for a separate regulatory approach to ensure that 2 GHz users will be fairly compensated for their relocation from the unlicensed bands. 2 GHz commenters suggest that the Commission establish a minimum transition period (typically two years; some concede one year) during which the 2 GHz licensee would have the opportunity to relocate to other spectrum. 2 GHz commenters (as well as PCS proponents) generally support the establishment of an escrow relocation fund to be contributed to by the manufacturers of unlicensed devices and oppose equipment authorization on an unlicensed basis during the transition period. Many 2 GHz commenters specify that, for data-PCS, the FCC should establish a baseline figure for

average replacement costs to use for purposes of funding the escrow account, and that manufacturers would have to meet any shortfall once actual replacement costs are determined.

Unlicensed PCS device proponents oppose delaying the relocation of 2 GHz users from the unlicensed bands. Telocator and APC, for example, propose that relocation from the unlicensed bands begin immediately or on an expedited schedule since total band clearing is necessary before unlicensed devices can be broadly introduced into the marketplace. Apple also opposes any transition period for unlicensed PCS. Instead, however, it recommends a phased implementation of both unlicensed and licensed new technologies, involving repacking microwave users at different channels within the 1.85-1.99 GHz bands according to a frequency-optimization plan, followed by the clearing of additional frequencies (subject to frequency optimization).

Comments Generally Support Use of Tax Certificates.

There is general support among commenting parties who addressed the issue that tax certificates are useful as a regulatory incentive to facilitate negotiation among incumbents and emerging technologies providers. Advantages typically cited by parties include more efficient and economical negotiations, and fairness to all parties concerned. Most parties who reached the issue suggested

that the FCC has the necessary authority to issue tax certificates.

2 GHz Microwave Licensees and Emerging Technologies Proponents Disagree Over Status of Future System Modifications, Expansions and New Facilities. 2 GHz microwave licensees generally assert that their applications for modifications, expansions and new facilities should be granted on a primary rather than a secondary basis. In support, they typically cite interference concerns and the inability to extend their systems to new or expanded service areas on a secondary status basis. On the other hand, emerging technologies proponents such as Personal Communications Network Services of New York argue that new facilities should be licensed on a secondary basis only, stating that, given the availability of other spectrum, there is no reason for incumbents to insist on remaining or expanding their occupancy of the 2 GHz band.

* * * * *

Please contact R. Michael Senkowski or Nicolle Lipper at 202-429-7000 if you have any questions or corrections concerning this summary.



Party	Length of Transition Period	Start Date For Computing Transition Period
Cox Enterprises	No transition period needed	Upon request of ET licensee
Pacific Telesis	No transition period needed	Upon request of ET licensee
Telocator	No transition period needed	Upon request of ET licensee
USTA	No transition period needed	As soon as channelization plan that allows for relocation is adopted or as soon as it can be shown that comparable alternative media is available
APC	3 yrs	Sept. 17, 1992 (date of adoption of transition plan)
Ameritech	3 yrs	Date of FCC <u>Order</u> channeling fixed microwave bands for relocation of incumbent 2 GHz fixed microwave licensees
Associated PCN Co.	3 yrs	
PCNS-NY	3 yrs	Upon request of ET licensee
Southern Natural Gas	3 yrs for major metropolitan areas	Upon request of ET licensee
Time Warner	Maximum of 3 yrs	Earlier of adoption of rechannelization plans or decision on licensing PCS in PCS NPRM in Docket No. 90-314
API	At least 5 yrs	When FCC begins granting authorizations to construct new technology systems
American Public Power Ass'n	At least 5 yrs; 8 yrs if fixed transition	Date ET provider is licensed to construct in a particular area
Central and South West	At least 5 yrs	When FCC begins granting authorizations to construct new technology systems
Commonwealth Edison Co.	At least 5 yrs	When FCC begins granting authorizations to construct new technology systems
Edison Electric Institute	At least 5 yrs	Date each new service license is granted in any particular area

Party	Length of Transition Period	Start Date For Computing Transition Period
Metropolitan Water District of Southern California	At least 5 yrs	When FCC begins granting authorizations to construct new technology systems
Montana Power Co.	At least 5 yrs	When FCC begins granting authorizations to construct new technology systems
NYNEX	5 yrs	Date ET license is granted
Questar	At least 5 yrs	Date of issuance of license to new technology providers
UTC	At least 5 yrs	Date each new service license is granted in any particular area
Niagara Mohawk Power Corp.	At least 7 yrs	When FCC begins granting authorizations to construct new technology system
National Rural Electric Cooperative	8 yrs for rural areas + 3 yr rolling period	3 yr rolling period starts date new technology license is granted in any particular area
Northwest Iowa Power Cooperative	8 yrs	
Southern Natural Gas	8 yrs for rural areas	
American Gas Ass'n	Minimum of 10 yrs (+1 yr "trial" period after licensing)	
Ass'n of American Railroads	At least 10 yrs	Date in each market when a PCS license is granted
GE American Communications	At least 10 yrs	
GTE	At least 10 yrs	Bona fide request from new user to negotiate relocation
Lower Colorado River Authority	At least 10 yrs	Date in each market when a PCS license is granted

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Party	Length of Transition Period	Start Date For Computing Transition Period
Southwestern Bell	10 yrs	Date of bona fide request for relocation
Telephone & Data Systems	Facilities of incumbent microwave license should maintain primary status in 2 GHz band for minimum of 10 yrs from effective date of <u>Second Report and Order</u> or minimum 2 yr period from grant of license for new service in operating area of incumbent microwave licensee, whichever period expires last	Either effective date of <u>Second Report and Order</u> or date of grant of license for new service in operating area of incumbent microwave licensee
Idaho Power Co.	15 yrs	Date each new service license is granted in any particular area
Plains Electric	Supports fixed period but does not specify length	

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**SUMMARY OF COMMENTS ON
FIRST REPORT AND ORDER
AND THIRD NOTICE OF PROPOSED RULE MAKING
ET DOCKET 92-9**

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**NEED FOR TRANSITION PLAN AND
METHOD OF IMPLEMENTATION**

American Personal Communications:

- The transition plan adopted by the FCC balances the needs of incumbent microwave users and companies planning to implement new technologies, such as PCS. (p. 1).

American Petroleum Institute:

- Supports Commission's attempt to establish transition framework which will ease burden of migration upon POFS licensees, but seeks clear assurance that plan will take into account and accommodate complexities and difficulties of proposed migration, i.e., time and engineering effort involved in replacing microwave links. (pp. 3-5).

American Public Power Association:

- Concurs that there is a need for a transition plan; however, advocates "rolling" or "sliding" voluntary negotiation period rather than "fixed" transition period. (pp. 3-5).

Apple Computer, Inc.:

- Reiterates view that relocation of existing microwave users from ET bands should be swift, but fair to microwave users; opposes lengthy transition periods prior to introduction of new technologies; in particular, no transition period should be imposed with respect to frequencies selected for introduction of unlicensed PCS. (p. 8). Proposes phased implementation of both unlicensed and licensed new technologies. (pp. 9-10) (see Relocation of 2 GHz Licensees in Unlicensed Bands).

Association of American Railroads:

- Generally supports transition framework proposed in Order and Notice, as long as outstanding issues are resolved to meet microwave users' reliability requirements; however, reiterates that underlying spectrum allocation is substantively and procedurally

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flawed. (pp. 6-7, 7 n. 15). Asserts that voluntary relocation agreements between ET providers and microwave licensees should be permitted at any time. (pp. 12-13).

Central and South West (see American Petroleum Institute):

- Supports Commission's attempt to establish transition framework which will ease burden of migration upon POFS licensees, but seeks clear assurance that plan will take into account and accommodate complexities and difficulties of proposed migration, i.e., time and engineering effort involved in replacing microwave links. (pp. 3-5).

Edison Electric Institute:

- Supports transition framework with flexible negotiations between new service providers and incumbent microwave licensees. (p. 3).

GE American Communications:

- Supports transition plan that is least disruptive to the public, including both users of 2 GHz microwave services and users of incumbent services in bands to which these microwave facilities would be located. (pp. 1-2).

Lower Colorado River Authority (same as Association of American Railroads):

- Generally supports transition framework proposed in Order and Notice, as long as outstanding issues are resolved to meet microwave users' reliability requirements; however, reiterates that underlying spectrum allocation is substantively and procedurally flawed. (pp. 6, 6 n. 14). Asserts that voluntary relocation agreements between ET providers and microwave licensees should be permitted at any time. (pp. 13-14).

Metropolitan Water District of Southern California (see American Petroleum Institute):

- Supports Commission's attempt to establish transition framework which will ease burden of migration upon POFS licensees, but seeks clear assurance that plan will take into account and accommodate complexities and difficulties of

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proposed migration, i.e., time and engineering effort involved in replacing microwave links. (pp. 4-6).

Montana Power Company (see American Petroleum Institute):

- Supports Commission's attempt to establish transition framework which will ease burden of migration upon POFS licensees, but seeks clear assurance that plan will take into account and accommodate complexities and difficulties of proposed migration, i.e., time and engineering effort involved in replacing microwave links. (pp. 3-5).

National Rural Electric Cooperative Association:

- Supports transition plan with implementation of additional rules that allow and encourage voluntary negotiations on level playing field. (p. 12).

Niagara Mohawk Power Corporation (see American Petroleum Institute):

- Supports Commission's attempt to establish transition framework which will ease burden of migration upon POFS licensees, but seeks clear assurance that plan will take into account and accommodate complexities and difficulties of proposed migration, i.e., time and engineering effort involved in replacing microwave links. (pp. 3-5).

Personal Communications Network Services of New York, Inc.:

- States that relocation of existing 2 GHz users to higher frequencies through three step transition plan originally proposed by Commission offers the only acceptable solution for providing suitable spectrum and interference protection; elimination of definite time frame for converting existing users' facilities from primary to secondary status will impede substantially success of relocation negotiations. (pp. 1-4). Incentive for voluntary negotiations will best be preserved if a waiver procedure is adopted rather than Commission's proposal for involuntary relocation; specifically, Commission should retain fixed time frame for converting existing users to secondary status but

permit existing user to apply for a waiver from conversion. (pp. 7-8).

Questar Service Corporation (see American Petroleum Institute):

- Supports Commission's attempt to establish transition framework which will ease burden of migration upon POFS licensees, but seeks clear assurance that plan will take into account and accommodate complexities and difficulties of proposed migration, i.e., time and engineering effort involved in replacing microwave links. (pp. 4-6).

Telephone and Data Systems, Inc.:

- A transition plan is needed to help incumbent microwave licensees negotiate relocation in a manageable fashion and to minimize disputes. (pp. 2-4).

Telocator:

- Advocates transition plan framework rather than merely providing for current users' primary status to expire on a fixed date. (p. 3). Details procedures to minimize disputes and allow timely access to 2 GHz spectrum; these include providing ET providers and 2 GHz licensees with a choice of three alternatives for satisfying relocation requirements (see Cost Compensation); initiating relocation process with "Notice of Request for Accommodation" which leads to exchange of information necessary to begin negotiation of issues attendant to relocation; and procedures for dispute resolution. (see Mechanisms for Dispute Resolution). (pp. 8-13).

Time Warner Telecommunications:

- Concurs that there is a need for transition plan and supports basic parameters of Commission proposal while proposing modifications concerning such elements as length of transition and definition of comparable alternative facilities. (p. 4). Commission should clarify that new service provider has option to begin construction of alternative facilities prior to end of transition period, even if existing user has declined to enter into voluntary negotiations up to that point in time; this option will maximize incentives of

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existing users to negotiate and participate actively in construction of alternative facilities while adhering to equitable relocation procedures. (pp. 13-14).

United States Telephone Association:

- Supports transition plan that permits fair and equitable sharing of 2 GHz frequencies and/or relocation of existing 2 GHz facilities to other spectrum. (pp. 1-2).

Utilities Telecommunications Council:

- Supports adoption of transition procedures that invoke marketplace forces to allow for orderly relocation of incumbent microwave systems. (p. 4). Although irrelevant to amount of time that should be allowed for voluntary negotiations, reasonable estimate of time required to complete a simple microwave relocation is 15 months; relocation of multiple paths would take significantly longer. Attachment shows time line depicting steps involved in routine relocation; however, if new site must be secured, together with zoning, environmental, and FAA approvals, time could increase by 6-12 months, or more. Survey of UTC's members suggests 4 years for each licensee to relocate all its facilities from 2 GHz band, with some respondents indicating up to 15 or 20 years. (pp. 20-21). Recommends detailed transition procedures for mandatory relocation program, including procedures for initiating process, dispute resolution, and related issues. (pp. 28-30).

**LENGTH OF TRANSITION FOR RELOCATION
OF 2 GHz MICROWAVE LICENSEES**

American Gas Association:

- The transition period should be as long as possible, with a minimum of ten years before involuntary negotiations would be required. The additional time will enable the FCC to gather more information on the feasibility of various technologies, work out rechannelizing issues, and develop a record on public need for emerging technologies. A longer transition period also ensures that serious providers enter the market and gives those companies that have recently purchased new equipment time to recoup their investment. (pp. 2-3). Also supports a one year trial period after licensing during which an existing user cannot be forced out of the spectrum; one year period would provide the existing user time to determine if its new system is adequate. (p. 3).

American Personal Communications:

- Supports a three year general transition plan to hasten the introduction of new services, prevent incumbent users from extracting windfall profits from new licensees, and encourage investment in new technologies. (pp. 4-7). The transition period should begin from the date on which the transition plan was adopted, September 17, 1992. (p.7).

American Petroleum Institute:

- Advocates a five year transition plan; this time period is required to relocate critical microwave links within existing systems. (pp. 4-7). The transition period should be uniform because incumbent licensees will face greater migration difficulties in geographic areas where little spectrum is available. (pp. 8-9). The transition period should begin when a new technology proponent obtains an operational or construction authorization from the FCC. (pp. 9-10).

American Public Power Association:

- Supports "rolling" or "sliding" voluntary negotiation period that extends for at least five years commencing on date new technology service provider is licensed to construct in a particular

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